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Supreme Court of the United States

OCTOBER TERM, 1964

No. 791

UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

E. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d/b/a Elkhorn Coal Company

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (called "UMW" herein), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit[1] entered October 3, 1964, in Case No. 15,046, styled *R. P. Price, C. H. Kelly and Follace Fields, Partners, d/b/a Elkhorn Coal Company,* Plaintiffs-Appellees[2] v. *United Mine Workers of America,* affirming a judgment entered October 10, 1961 by the United States District Court for the Eastern District of Kentucky—Covington Division[3] against UMW in Elkhorn's favor for $250,000 and costs (17-18a).[4]

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[1]Called "Sixth Circuit" herein.

[2]Called "Elkhorn" herein.

[3]Called "district court" herein.

[4]Page references are to the certified Appendix Record filed in this Court's Clerk's office under Rule 21. References to the Appendix to this Petition are indicated by the symbol "A."

All emphases herein are supplied.

A certified appendix record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A to this Petition (pp. 1-9a); in the certified appendix record; and it is reported in 336 F. 2d 771. No written memorandum was issued by the district court.

JURISDICTION

The Sixth Circuit's judgment, of which complaint is herein made, was entered October 3, 1964. This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

In the complaint and its supplement, Elkhorn asserted "The Court has jurisdiction . . . by virtue of . . . Section 303 of the Labor-Management Relations Act of 1947"[5] (29 USCA 187).

QUESTIONS PRESENTED

I. Is violence, which attends secondary picketing activity for which Congress has provided the recovery of damages under Section 303, Labor Management Relations Act, 1947, prohibited conduct thereunder and federally preempted so as to preclude federal district court jurisdiction of a nonfederal, state common-law tort action for compensatory and punitive damages based thereon under the doctrine of pendent jurisdiction?

II. Where violence allegedly occurs in connection with primary picketing, in the absence of diversity of

[5]Herein called "Act".

citizenship does federal district court jurisdiction exist to hear and determine the issues relating thereto and to enter judgment for compensatory and punitive damages based thereon in a nonfederal, state common-law tort action under the doctrine of pendent jurisdiction, even if joined with a federal claim based upon Section 303, Labor Management Relations Act, 1947?

III. Where, in an action brought under Section 303, Labor Management Relations Act, 1947, there is joined a nonfederal, state common-law tort claim, is an award of punitive damages proper for violence attending secondary picketing activities within the scope of the federal statute?

IV. Was there substantial evidence to warrant the jury's verdict of liability and of compensatory and punitive damages?

STATUTES INVOLVED

Pertinent statutory provisions involved are Labor Management Relations Act, 1947, Ssctions·303(a) and (b), Section 8(b)(1)(A), and Section 8(b)(4)(i) [29 USCA 187(a) and (b), 158(b)(1)(A), and 158(b)(4)(i)]; and 28 USCA 1332. These appear in Appendix B herein.

STATEMENT OF THE CASE

a. Kind of Action and The Judgment Against UMW.

Asserting jurisdiction under the Act's Section 303, Elkhorn sought compensatory and punitive damages for strike activity in March, 1959, and thereafter for attendant loss of business and profits. Charging UMW, as the Sixth Circuit's opinion recites (A. 6-7a), with "a secondary boycott to induce Elkhorn's employees to engage in a concerted refusal, in the course of their employment, to handle or work on coal produced by other employers

with the object of forcing plaintiffs to cease doing business with other employers and force them to recognize or bargain with UMW as the representative of the employees of such other employers", (2) "to induce the employees of other employers to engage in a concerted refusal to handle coal destined for plaintiffs' premises with the object of forcing and compelling other employers and persons to cease doing business with [Elkhorn] and compel [Elkhorn] to recognize UMW as the representative" of Elkhorn employees, and (3) "acts of violence and depredation".[6]

In a jury trial, the district court overruled UMW's motions for a directed verdict (15-16a, 303-18a, 517a)[7], entered judgment on October 10, 1961 upon the jury verdict finding UMW liable for compensatory damages of $150,000.00 and punitive damages of $100,000.00 (17-18a, 548a), and on November 30, 1961 denied UMW's post-judgment motion for judgment in accordance with motions for directed verdict or for a new trial (20-23a).

Upon appeal, the Sixth Circuit, by judgment of October 3, 1964 (A. 9a), and based upon an opinion of the same date (A. 1a), affirmed the district court's judgment against UMW.

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[6]UMW's answer (10a) asserted: The district court had no jurisdiction of the subject matter or UMW; Elkhorn "failed to allege such facts as would show jurisdiction" under Section 303 of the Act; the complaint "does not state a cause of action under the Constitution, laws or treaties of the United States"; diversity of citizenship between the parties plaintiff and defendant was lacking; and punitive damages were not recoverable under the Act's Section 303. It denied every material allegation in the complaint, except it admitted UMW is a "labor organization" within the Act's meaning; that UMW represented employee members within the eastern district of Kentucky; and that it "has not been certified as a representative of the employees" mentioned (11a).

[7]UMW also moved to strike evidence of "incidents involving unknown persons and all evidence where there is no showing . . .defendant was connected with such incidents" and all evidence concerning incidents at places other than Elkhorn's premises (15-16a, 303-18a, 517a). These motions were overruled.

b. Statement of Facts.

When 176 coal companies in UMW's District 30, formerly under UMW contract, refused to execute the National Bituminous Coal Wage Agreement of 1950, amended December, 1958 (319a), District 30's President Carson Hibbetts explained to union members on March 14 and 15 (319-20a)[6] at meetings at Pikeville, Hazard and Whitesburg, Kentucky, proposed efforts to have the companies execute the amended Agreement (292a). Undisputed evidence is that picketing was to be voluntary and peaceful, neither weapons nor drinking would be permitted,[7] and pickets were to persuade persons working "not to work" and not to destroy the "security of our people" (294-95a).

Among operations which had not signed the amended agreement were those of Elkhorn, owned by R. P. Price, C. H. Kelly and Follace Fields. These operations consisted of a tipple at Mayking, at Ermine and a leased tipple at Kona, all in Kentucky (69-70a).

Neither of Elkhorn's operations produced coal. Elkhorn, however, owned a seam of coal, part of which it orally licensed to ten coal companies under requirement that each bring its mined coal to Elkhorn's tipple (72a).

In another instance, it had arrangements with Laurel Branch Coal Company (70a) which was required to bring its mined coal to the Kona tipple (71a). Elkhorn furnished Laurel Branch its capital for operations (56a, 506a), handled its financial affairs, which included furnishing it with "money to pay off the men" (70a, 504a), and integrated its records with those of Elkhorn (71a). Coal produced was trucked to Elkhorn's tipples, hauled

[6]Unless otherwise indicated, all dates refer to the calendar year 1959.
[7]293-94a, 360a, 397a, 411a, 415a, 424a, 427-28a, 430a, 433a, 441a.

by those from whom the coal was purchased (34a); and Elkhorn had nothing to do with the hiring, firing or paying the truck drivers (35a).

Eight or ten other operators not mining Elkhorn's coal brought their coal to Kona (73-74a).

Events at Elkhorn's Operations

Picketing began March 16 and ended April 30 (361a), when the L & N Railroad and the National Labor Relations Board obtained injunctions (343a, 351a, 396a, 409a).

No picketing occurred at either the Ermine or at Kona tipple which burned on the night of April 14-15, but no evidence identified anyone responsible therefor.

According to Elkhorn witnesses (112-13a, 120a), and denied by UMW witnesses (368a, 407a, 414a, 423-24a, 430a, 442a), District 30's field representative Joe Davis, wih a group of pickets, came to the Mayking tipple on March 16 were three employees, all UMW members, were working and ordered one of them to "Shut the tipple down" but this was not done at the direction of Elkhorn's Price (113a). One of the three Mayking employees joined the strike (407a), as did the Kona tipple employees (79a, 88a) and Laurel Branch employees, all of whom were UMW members (81a, 448a).

There was evidence that Mayking picketing was on a 24-hour per day basis. Among the pickets there were employees of operators whose coal was brought to Mayking for processing (395-96a, 374-75a, 408-09a), and at least four coal producers, themselves UMW members (391a, 394a, 395-96a, 410-11a, 412a). One of them related he refused to haul coal because "our hospital card meant more than to haul coal to a non-union mine" (408-09a). One Mayking employee related pickets called him "names",

he had "pop bottles" and invited them "to come on", testifying "I wasn't too easy to force" (120a). A second employee claimed he was threatened (114-15a).

While there was testimony that pickets gathered around the railroad switch on numerous occasions, when train crews arrived "with empties", the crews talked with pickets and then took "their empties" on up the railroad. A railroad special agent admitted an operating train crew would not cross a picket line (165-66a) and that the railroad had no trouble at either Mayking, Ermine or Kona (165a).

Though six Elkhorn witnesses related that shooting occurred at Mayking (95-96a, 116a, 121a, 130a, 223a, 104a, 107a), only two truckers hauling coal to Mayking told of having difficulties there, each relating but one incident and at different occasions (121a, 220-23a), and a state trooper admitted state police were unable to identify who did any shooting (204a) and found only a 22-year old "boy" on whom they found shells but no gun (229a).

Incidents at Operations Controlled by Price and Fields

Elkhorn's partners (Price, Kelly and Fields) are the officers and directors of K. & F. Coal Company which owns and operates a tipple near Colson, Kentucky (31a, 550a). Within one-half mile (33a), Camp Fork Coal Company, of which Fields is vice-president and he and Price are two of its three directors (551a), owns and operates a tipple. Eight or ten miles from Colson (33a), at Blackey, Kentucky, Blackey Gem Coal Company owns and operates a tipple; and Price and Fields are its officers and two of its three directors (550a).

Pickets appeared in large numbers at the tipple at

Colson on three occasions in March (191-93a). On one occasion both state troopers and guards were armed (199a) but a state trooper saw no pickets with firearms (199a).

There was testimony that on March 16 and 17, K. & F. tipple was visited by three large groups of pickets (91a, 97a, 98a). On two occasions Price admitted he was armed (45a, 88a). On one occasion there was evidence that pickets attacked three tipple employees, turned over two truckloads of coal, assaulted a truck driver after ordering him "to dump his coal" (46a, 98a, 99-100a), and attempted unsuccessfully to turn the scale house over, with Price in it (46a).

On March 24, after Price refused to sign a contract at Camp Fork Coal Company, an estimated 1200 to 1500 men were stopped by state police when they approached the tipple. A trooper related the men stated "they were going to stop" the tipple from operating and truck drivers were not "going to dump coal when they were there" (210a). Pickets had no arms, but guards had machine guns and 50 or so rounds were fired at cars in which pickets were (416a).

The Incident at the Blair Operation

Of the companies whose coal was brought to Elkhorn, the Blair strip mining operation, about a mile and a half west of Mayking, was operating on April 6. Their six employees, UMW members, "agreed to not work until Mr. Blair signed the contract", but two returned (458-59a). On April 6, according to Emmett Blair, 35 to 50 men came to the operation, called "us dirty names", and told the Blairs to get out of the place (177a). While Blair stated one person had a gun and several had bull whips

(177a, 216a), other Elkhorn witnesses related they saw no firearms (182a, 218a). While two pickets admitted being at the operation with 15 to 18 men (460a), their purpose was "to get the men to join the union".

Activities at Operations other than at Elkhorn Operations

Over UMW objections (43-44a), the district court permitted the jury to hear of mass picketing and other activities at operations other than at Elkhorn's operations (193-94a, 199-200a, 204a, 215a, 222a); and though conceding there was no trouble with railroad crews at Elkhorn's Mayking, Kona or Ermine (165a), witnesses told of railroad tracks and trestle being dynamited at places 12 to 60 miles from Kona (161-65a) and of pickets stopping the train (211a).

Non-union Coal Operators testify concerning Property Damages at their Respective Operations, without Evidence showing any UMW Connection therewith or Responsibility therefor

Over UMW objections (233-34a, 254a, 43a), non-union coal operators were permitted to testify concerning property damages at their respective operations, without evidence showing any UMW connection therewith or responsibility therefor, though the operators admitted they did not know who had committed the acts (159a, 170a, 174a, 258-59a) or did not undertake to attribute the acts to anyone (260a, 232-33a).

Shooting Incidents at the Homes of Two Employees

Over UMW objections (122a, 123a, 132a), witnesses were permitted to relate to the jury shooting incidents at the homes of two of Elkhorn's employees (122-27a, 130-40a), though not identifying who had committed the

acts, and one witness conceding she did not know who had done it (127a).

Meetings between UMW and Coal Operators

Representatives of UMW, coal operators, Kentucky's Governor and the Federal Conciliation Department met in Washington April 8 (245a) and at Frankfort, Kentucky, a few days later (352a). At Washington, operators charged violence was discussed (234a, 241a) but admitted they did not accuse union officers and agents with its commission (237a, 246a). At Washington, an operators' attorney declared that "if you insist on putting that contract into effect . . . Big Sandy River will run with blood" (335a, 386a). At Frankfort, both sides complained of violence (352a).[10]

Elkhorn charged (67a, 235a, 240a, 242a, 248a, 255a), and UMW denied (334a, 335a, 352a, 386a), that a UMW representative stated the way to stop violence was to sign the contract. Elkhorn witnesses admitted that at Frankfort, UMW representatives disclaimed "having any part of the violence" (240a, 248a).

On June 16, District 30 officers wrote letters to local union officers denouncing unlawful conduct reported in the press and asked members to co-operate "in keeping the peace" (321-22a). County sheriffs were assured on June 12 of District 30's cooperation in opposing law violations (323-25a).

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[10]A district representative had his tie cut "off right under" his collar by a coal operator (370a); a coal truck blocked the road on pickets (434a); a picket was "jabbed off the railroad with either a pistol or shot gun" (437a); pickets were shot at (439a); picket cars were machine gunned (416a); and a trucker tied sticks of dynamite behind his truck and dragged them, lighted, through the picket line (416a).

c. The District Court's Jury Charge and Interrogatories; The Jury Verdict and the District Court's Judgment.

The district court did not require, either in its charge or its interrogatories submitted for jury answer, a determination of whether UMW had violated Section 303 or the common-law of Kentucky. The jury charge treated *violence* indiscriminately and without concern whether it related to the federal or the nonfederal cause of action. Issues of liability and of damages were premised upon whether UMW was guilty of *"unlawful acts"*.[11] According to the charge, to avoid Section 303's ban, a strike must be conducted "in lawful manner". The jury charge emphasized that "fear or physical interference" was unlawful and a violation (524a).

It repeated UMW had no right to go upon Elkhorn's property and menace or threaten their employees and to place them "in fear of their jobs or their life or of bodily harm" (527a), and that UMW had no right to picket on Elkhorn's property or use mass picketing as would induce fear of life, bodily harm or property dam-

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[11] Interrogatories submitted to the jury and jury answers are (19-20a):

1. Was the coal business of the plaintiffs damaged by the *unlawful actions*, if any, of the defendant, its officers, agents or employees, or by someone acting under the direction and authority of its officers and agents? Answer "Yes."

2. If your answer to Interrogatory No. 1 is "Yes", do you believe that the *unlawful acts* were the acts of officers or agents who actually participated in the acts or who authorized such acts or ratified such acts after knowledge that they were committed? Answer "Yes."

3. Do you believe from all the evidence and all reasonable inferences that may be drawn from it that the plaintiffs were prevented from delivering coal that had already been sold, or from continuing to handle and deliver coal in accordance with contracts entered into with purchasers or had a reasonable opportunity to sell coal to purchasers at future dates? Answer "Yes."

4. If your answer to Interrogatory No. 3 is "Yes", do you believe that the plaintiffs would have realized a profit on the coal which they could have sold except for the *unlawful acts* of the defendant? Answer "Yes."

5. If your answer to Interrogatory No. 4 is "Yes", state what amount of money you believe would compensate the plaintiffs for damages they sustained by reason of the loss, the sum of $150,000.00.

ages to Elkhorn's employees or truck operators (529a) or put secondary employers in fear (524a).

While the district court read to the jury Section 303's provisions and gave illustrations, as the Sixth Circuit pointed out, it did not stress that Section 303's concern related to the *object* of union activity. The jury charge did not undertake to apprise the jury of this Court's judicial guides which distinguish *primary* picketing from *secondary* picketing. It did not tell the jury that Section 303 "could not be literally construed" or that "mixed use" of Elkhorn's premises "would not bar picketing rights of the striking employees" or that "The key to the problem . . . is . . . the type of work being done by" employees using the entrance to Elkhorn's premises.[12]

Nowhere did the district court explain to the jury that inducement of truck drivers to have their employers sign the UMW contract was not violative of the statute, that Section 303 is not applicable to truck owners,[13] that picketing to persuade employees to respect a picket line is legal,[14] and that violence on the picket line in and of itself does not bring conduct in conflict with Section 303.

Told by the district court that if it found for Elkhorn, it could award loss of reasonable profits due to Elkhorn's inability to produce and sell coal "due solely to the unlawful acts, if any, of" UMW, and also punitive damages for "wanton, malicious or reckless" acts (531a), the jury, finding for Elkhorn, fixed $150,000.00 compensatory damages and $100,000.00 punitive damages (548a).

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[12]These omissions fall within the mandates of *Local 761, Electrical Workers* v. *NLRB*, 366 U.S. 667, 672, 680, and *United Steelworkers* v. *NLRB*, 376 U.S. 492, 11 L. ed 2d 863 (1964).

[13]The activities herein preceded the 1959 amendment of Section 8(b)(4) of the Act. The amendment appears in Appendix B herein, page 11a.

[14]UMW's proffered instructions 8 through 13 (544a-46a), rejected by the district court (515a) over UMW objections (537-38a), would have given the jury the requisite guides for determining whether Section 303 had been violated.

The district court, on October 10, 1961, entered judgment against UMW in Elkhorn's favor for $250,000.00 and costs (18a).

d. The Sixth Circuit's Decision and Judgment.

In its affirmance of the district court's judgment, the Sixth Circuit swept aside certain contentions of UMW, commenting merely that "many of the questions raised in the present appeal have been . . . decided adversely to UMW" in other Sixth Circuit cases (A. 3a).[15]

The Issues of Federal Preemption and Pendent Jurisdiction

The Sixth Circuit conceded, as UMW contended, that "picketing was aimed not only at" Elkhorn but "at about one hundred seventy-six coal operators in the field . . . to 'persuade' coal operators to sign" the National Agreement (A. 7-8a) and declared the jury could so find (A. 7a). It noted that "picketing extended to" Elkhorn's employees and to mine operators and their employees, who supplied coal to Elkhorn, and truck drivers and their employees, who delivered coal to Elkhorn's tipples (A. 9a); and it approved district court jurisdiction to determine both the federal and non-federal claims (A. 7a).

The Sixth Circuit's recitals (A. 3a) that UMW "contends that Congress preempted the entire field in the enactment of Section 303 and, therefore, the state courts no longer have jurisdiction of a common law tort action for damages against a labor union for conspiracy or malicious destruction of a business or property" make clear the Sixth Circuit misconceived UMW's position.

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[15] These contentions included UMW's arguments that the evidence was insufficient, as a matter of law, to support a jury verdict that UMW had violated either Section 303 or Kentucky's common law; that there was reversible error in the trial court's admission in evidence shooting incidents, the burning of Kona tipple and other events herein discussed (ante, pp. 6-10); and that the evidence did not sustain the jury award of compensatory damages or punitive damages.

UMW urged upon the Sixth Circuit that violence attending secondary activities fell within conduct proscribed by Section 303 and that, because of federal preemption, such conduct could not serve as a basis for a common-law tort action. In addition, UMW stressed that, because Congress had not provided a *federal* remedy for violence enmeshed in *primary* picketing, thereby differentiating between primary and secondary picketing, pendent jurisdiction was not available to give district courts jurisdiction over the nonfederal claim because it did not meet the standard of *Hurn* v. *Oursler,* 289 U.S. 238 (1933) needed for application of that doctrine.

The Sixth Circuit, however, obviously extracting the alleged violence accompanying both types of picketing as a predicate for a common-law tort claim, declared that "Section 303 does not immunize unlawful acts of force and violence or malicious destruction of property committed by anyone in the course of a strike whether characterized as primary or secondary. It is not a haven for such conduct" (A. 5a).

The Sixth Circuit rejected UMW's contention that the doctrine of federal preemption precluded the application of *Hurn's* jurisdiction. Ignoring that *Hurn's* rationale of judicial economy required that federal and nonfederal claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U.S. 246), the Sixth Circuit declared that "When a substantial federal claim is asserted the federal court has jurisdiction to fully determine it including its local aspects. The federal and state claims are regarded merely as different grounds to support a single cause of action" (A. 6a).

Denying UMW's contention that this Court's *Local 20,*

Teamsters v. *Morton*, 377 U.S. 252, 12 L. ed 2d 280 (1964) supported its contention that when a nonfederal claim is supported by evidence reflecting a Section 303 violation, Congress thereby foreclosed jurisdiction to entertain a common-law tort action for damages based thereon, the Sixth Circuit declared that *Morton* was "a case of peaceful picketing and did not involve violence" (A. 3-4a).

To UMW's argument that since Section 303 provided a remedy sounding in damages for force and violence when attending conduct which was violative of that section, the Sixth Circuit pointed to *Automobile Workers* v. *Russell*, 356 U.S. 634 (1957) and *United Construction Workers* v. *Laburnum Corp.* 347 U.S. 656, saying "We are taught" by those cases that "Congress, in enacting Section 303, did not deprive the victim of tortious conduct of his common law rights for all damages suffered" (A. 5a). When UMW argued that *Russell* and *Laburnum* were based on diversity of citizenship and that Section 303 provided a remedy not available in the two cases, the Sixth Circuit declared, "This is a distinction without a difference for their principles are applicable" and that UMW's contention is "refuted by" language in *Laburnum* "where state jurisdiction was recognized in Section 303 cases" (A. 5a).

Another ground upon which UMW relied for rejection of pendent jurisdiction was that Kentucky does not permit an action to be brought against an unincorporated association; but, declared the Sixth Circuit, "The fact that a voluntary unincorporated labor organization may not be amenable to process in its common name in Kentucky does not affect the pendent jurisdiction of the federal court, for Section 303 permits suits against such an organization. We are concerned here with substantive rights not mere state procedural problems" (A. 6a).

The Issue of Punitive Damages

In its imprimatur of the jury's award of $100,000.00 of punitive damages, and the district court's judgment based thereon, the Sixth Circuit, first observing that pendent jurisdiction "permits an award of punitive damages where authorized by state law" (A. 6a), held the district court's "instructions as to punitive damages conformed to Kentucky law as we have interpreted it in *Flame and Sunfire*"[15a] (A. 9a), without responding to UMW's contention that since the district court refused to advise the jury, as UMW's *proffered but rejected* instruction would have informed them, that Section 303 did not authorize punitive damages, and even if pendent jurisdiction of the nonfederal claim existed, the issue of punitive damages had been submitted to the jury without concern whether such acts related to Section 303 or to Kentucky's common-law violations.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Opinion Represents an Incorrect Construction and Interpretation of Prior Important Decisions of This Court Construing the Act's Section 303.

In contending that application of pendent jurisdiction was precluded in federal preemption cases, UMW pointed to this Court's disagreement with the Sixth Circuit in *Local 20, Teamsters* v. *Morton*, 377 U.S. 252 (1964) that "this question can be resolved . . . by reference to the doctrine of pendent jurisdiction". The Sixth Circuit, as its opinion shows, read *Morton* narrowly and as restricted to *peaceful* picketing, and applicable only in the "absence of force and violence," saying "Mr. Justice Stewart . . . was careful to point out many times that *Morton* was a case of peaceful picketing and did not involve violence" (A. 3-4a), and that "Section 303 does not immunize un-

[15a] These references are to *Flame Coal Co.* v. *UMWA*, 6 Cir., 303 F. 2d 39, cert. den. 371 U.S. 891, and *Sunfire Coal Co.* v. *UMWA*, 6 Cir., 313 F. 2d 108, cert. den. 375 U.S. 924.

lawful acts of force and violence or malicious destruction of property committed by anyone in the course of a strike whether characterized as primary or secondary" (A. 5a). UMW had not contended that such conduct was immunized but that conduct, whether peaceful or violent, which fell within the scope of activities proscribed by Section 303 had been federally preempted, and that Congress had thereby occupied the field and foreclosed a common-law action for any tort based thereon.

Morton reads: "Section 303(b) . . . expressly authorizes . . . courts to award damages to any person injured by certain secondary boycott activities described in § 303(a)" (12 L. ed 2d 285). Teachings of this Court, long prior to *Morton*, were that it was immaterial whether such banned secondary activities were peaceful or violent, and so long as a union engaged in conduct interdicted by the statute, liability was properly imposed. *NLRB* v. *Int. Rice Milling Co.*, 341 U.S. 665, 672. Indeed, the Sixth Circuit itself has sanctioned a money judgment for secondary picketing, *which included attendant violence*, under the Act's Section 303, appraising the conduct as "a secondary boycott within the meaning of Section 303." *Sunfire Coal Co.* v. *UMWA*, 6 Cir., 313 F. 2d 108, cert. den. 375 U.S. 924.

Since violent secondary pressures are barred the same as peaceful pressures, *Morton's* holding that *"If the provisions of Section 303 mark the limits beyond which a court, state or federal, may not go in awarding damages for a union's secondary activities, then the doctrine of pendent jurisdiction can be of no service"* (12 L. ed 2d 284), is signally relevant herein. Where Congress has preempted the field, the states may not act concurrently (*Bethlehem Steel Co.* v. *N. Y. Labor Relations Board*, 330 U.S. 767), nor may state laws be applied in coincidence

with, as complementary to or as in opposition to, federal enactments. *Missouri Pacific R. Co.* v. *Porter,* 273 U.S. 341, 346; *Pennsylvania R. R. Co.* v. *Public Service Com.,* 250 U.S. 566, 569.

Both the Sixth Circuit (A. 8a) and Elkhorn emphasize that court injunctions were obtained and the record established that one was at the National Labor Relations Board's instance (343a). This stresses the validity of UMW's position of federal preemption which accords with the doctrine of *Local 100 of the Assn. of Journeymen* v. *Borden,* 373 U.S. 690 (1963) and *Local No. 207, etc. Iron Workers* v. *Perko,* 373 U.S. 701 (1963) that state courts are without jurisdiction of subject matter arguably within the NLRB's jurisdiction.

The Sixth Circuit erroneously opined (A. 5a) that this Court's *Russell* (356 U.S. 634) and *Laburnum* (347 U.S. 656) cases are applicable herein. Its opinion clearly shows its misconception of *Laburnum.*

Both *Russell* and *Laburnum* were common-law court actions instituted in *state* courts as distinguished from the instant case which involved federal court jurisdiction and diversity of citizenship. Not a single word in *Laburnum* supports or warrants the Sixth Circuit's characterization of that case as one in which "state jurisdiction was recognized in Section 303 cases" (A. 5a), when *based upon nonfederal claims.* As shown below, *Laburnum's* quote spoke in relation to *federal* claims only. The converse, however, is true. It is notable that *Laburnum* points to the legislative history of the Act's Section 8(b)(1)(A) [347 U.S. 668]. The facts related in the Court's opinion show they are concerned with *primary* picketing, not secondary activity under Section 303 (347 U.S. 660, fn. 4).

Moreover, the Sixth Circuit's misconception and error are manifest from *Laburnum's* language. Whereas, *Laburnum* pointed out, *first,* that "Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct" (347 U.S. 663-64); yet, *secondly,* this Court carefully pointed out that "One instance in which the Act prescribes judicial procedure *for the recovery of damages* caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate *claims for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages* . . . By this provision, the Act assures uniformity, otherwise lacking, in rights of recovery in the state courts . . ." (347 U.S. 665-66). *Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468, 477, speaks thusly of *Laburnum*: ". . . this Court sustained the state judgment on the theory that there was *no compensatory relief under the federal Act* and no federal administrative relief with which the state remedy conflicted."

It is thus clear that Congress was not indifferent to the phase of damages resulting from conduct interdicted under the Act's secondary boycott provisions, and that what was the lacking remedy in *Russell* and *Laburnum,* namely, a federal cause of action for remedies, is provided for in Section 303. Since substantive rights and remedies under state laws are, under federal preemption superseded, "Whatever Congress determines, either as to a regulation or the *liability* for its infringement, is exclusive of state authority." *Sherlock* v. *Alling,* 93 U.S. 99, 104.

Morton's recognition that federal preemption precluded application of pendent jurisdiction applies herein

with equal pertinency even in light of alleged violence in connection with secondary picketing activities. Such recognition and the rationale of federal preemption in cases above discussed make clear the invalidity of the Sixth Circuit's refusal herein to apply federal preemption rather than pendent jurisdiction.

This Court has heretofore regarded the importance of jurisdictional issues as a basis for the award of certiorari. *Automobile Workers* v. *Russell*, 356 U.S. 634, 637. Moreover, the problem posed is a significant one in a construction of Section 303 in the development of national labor policy.

II. The Sixth Circuit's Opinion Conflicts With This Court's Rationale in Pendent Jurisdiction Decisions.

Under Reason I it has been demonstrated that pendent jurisdiction is precluded as to the violence which allegedly attended the secondary picketing activities. The following discussion demonstrates that the Sixth Circuit's warrant of pendent jurisdiction as to any violence in relation to primary picketing conflicts with standards of this Court to be applied in authorizing pendent jurisdiction.

Congress molded its laws separately and differently in dealing with the *right* of primary picketing and with its *prohibitions* against secondary activities. For conduct barred in the Act's Section 303, Congress provided a *federal* remedy of damages. It gave no such federal remedy for tortious conduct enmeshed in the right of primary picketing, and employers complaining thereof, as Elkhorn did, have been by judicial mandate accorded a damage action remedy as a *state* cause of action as distinguished from a *federal* one. *United Automobile Work-*

ers v. *Russell*, 356 U.S. 634; *United Construction Workers* v. *Laburnum Corporation*, 347 U.S. 656. Thus, the factual situation involved in an alleged tortious violation of the permissive right to strike is juridically distinct from that which serves to ground a violation of it under Section 303; and the distinctions are emphasized in the recent pronouncements of this Court in *Local No. 761, Electrical Workers* v. *NLRB*, 366 U.S. 667 and *United Steelworkers* v. *NLRB*, 376 U.S. 492, 11 L. ed 2d 863, 869-70 (1964), noting in the latter case that violence in primary picketing was unrelated to a violation of the Act's Section 8(b)(4), which is the counterpart of Section 303.

The Sixth Circuit correctly states that pendent jurisdiction became embedded in federal law in *Hurn* v. *Oursler*, 289 U.S. 238 (1933), but this Court rationalized *Hurn's* "judicial economy" doctrine was warranted when federal and nonfederal claims *"so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances."* As noted, the factual situations involved in *primary* picketing are not identical with those concerned in secondary activities banned under Section 303.

The necessity that facts underlying the federal and nonfederal claims be "substantially the same" was recognized and implemented in *Armstrong* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938), cited by the Sixth Circuit (A. 5-6a); yet in rejecting UMW's contention that pendent jurisdiction is not applicable, the Sixth Circuit ignored this requisite element, as well as this Court's teaching that *Hurn's* "rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action because it is joined in the same complaint with a federal cause of action" (289 U.S. 245-46).

Without concern for these professions in *Hurn*, the Sixth Circuit states that "Under *Hurn*, piecemeal adjudication of a claim by different courts was eliminated. When a substantial federal claim is asserted the federal court has jurisdiction to fully determine it including its local aspects" (A. 6a).

Indeed, in a non-labor case, the Sixth Circuit had itself proclaimed that pendent jurisdiction required "that both federal and nonfederal causes rest upon substantially identical facts". *French Renovating Co.* v. *Ray Renovating Co.*, 6 Cir., 170 F. 2d 945 (1948). Ignoring the judicial standards and that the factual situations in primary picketing are necessarily distinct from proscribed secondary activities (*Local No. 761, Electrical Workers* v. *NLRB*, 366 U. S. 667 and *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964), the Sixth Circuit concludes that "The federal and state claims are regarded merely as different grounds to support a single cause of action" (A. 6a).

Where, as herein, compensatory damages and punitive damages alike have been rendered by a jury upon charges and interrogatories which did not require answers that reflected whether the jury believed that the federal statute or the Kentucky common-law had been violated, the issue of pendent jurisdiction is vital. Its implementation in conflict with the standards heretofore enunciated by this Court warrants review by certiorari.

III. The Sixth Circuit's Approval of the Punitive Damage Award Conflicts With the Congress' Intent in Enacting Section 303, With This Court's *Morton* Decision, and With a Fourth Circuit Decision.

This Court made clear in *Morton* that punitive damages for Section 303 violations "conflict with the congressional judgment, reflected both in the language of the

federal statute and in its legislative history" (12 L. ed 2d 286) and that "insofar as punitive damages . . . were based on secondary activities which violated only state law, they cannot stand, because . . . substantive state law in this area must yield to federal limitations" (p. 287). *Morton* (p. 287) cites with approval the Fourth Circuit's *UMWA* v. *Patton*, 4 Cir., 211 F. 2d 742, 747-50, which rejected a punitive damage award under Section 303.

While the Sixth Circuit's opinion indicates the punitive damage award was for violation of Kentucky law (A. 9a),[16] an analysis of the Sixth Circuit's opinion on federal preemption and pendent jurisdiction leads to the conclusion the award is based upon the Sixth Circuit's belief that violence accompanying both primary picketing and secondary activity fell within the nonfederal claim (A. 5a).

Clearly it was not Congress' intention that violence accompanying secondary picketing be extracted from such activity so as to become the basis in whole or in part for a separate and nonfederal cause of action or claim for punitive damages. Yet, this is precisely what the Sixth Circuit has achieved. Its result counters not only Congress' express language in Section 303 that a person damaged by conduct proscribed therein "shall recover the damages by him sustained", but it conflicts with the rule that "Whatever Congress determines, either as to a regulation or the *liability* for its infringement *is exclusive of state authority.*" *Sherlock* v. *Alling*, 93 U.S. 99, 104. As *Garner* v. *Teamsters*, 346 U.S. 485, 488, recites, "This is not an instance of injurious conduct which the National Labor Relations Board is without express power

[16] The Sixth Circuit's opinion so states with the addition of the words "as we have interpreted it in Flame and Sunfire" (A. 9a). Actually, in "*Sunfire*" there was no punitive damages award, and there is no discussion of Kentucky's law on such damages in *Flame*.

to prevent", for, as the record shows, that Board procured an injunction (343a). Nor is Elkhorn without the remedy of a damage action as this Court found to exist in *Russell* and *Laburnum*, for Congress has provided therefor in Section 303. In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247, this Court observed, "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

Moreover, to permit the Sixth Circuit to sanction a judgment for punitive damages by the judicial strategy of treating violence attending secondary activity as a nonfederal claim would conflict with Congress' will, as this Court's *Morton* and the Fourth Circuit's *Patton* express, that punitive damages were not to be allowed for unlawful conduct falling within the proscriptions of Section 303.

Though the Sixth Circuit approved the punitive damages because the district court's "instructions as to punitive damages conformed to Kentucky law" (A. 9a), the district court did not advise the jury that its award of such damages would be under Kentucky's law (531a).

Since, as shown *(ante*, p. 11-12), the district court's jury charge dealt with such violence indiscriminately and without concern as to its being violative of federal or nonfederal claims and the jury was not told that punitive damages for violence in connection with secondary picketing under Section 303 were forbidden, as UMW's instruction would have advised (548a), and the jury's verdict was a general one, it is not possible to determine if the punitive damage award related to violations of Section 303 or of Kentucky's common law. As this Court

held in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30: "Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . , it is unnecessary . . . to explore the legality of the other theories."

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 15,046, on October 3, 1964.

Respectfully submitted,

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December 29, 1964

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APPENDIX A

No. 15046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

R. P. PRICE, C. H. KELLY and FOLLACE FIELDS, Partners, d.b.a. ELKHORN COAL COMPANY,
Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

APPEAL from Judgment and Order of the United States District Court for the Eastern District of Kentucky, Covington Division.

Decided October 3, 1964.

Before: WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and PRETTYMAN, Senior Circuit Judge.

WEICK, Chief Judge. This appeal presents questions concerning the liability of United Mine Workers of America under Section 303 of the Labor-Management Relations Act, 1947,[1] and the common law of Kentucky, for damages to Elkhorn Coal Company's business and property sustained by reason of the alleged commission by the Union of un-

[1]United Mine Workers of America is referred to herein as UMW. The pertinent provisions of 29 U.S.C. § 187 are:

Labor Management Relations Act, 1947, Section 303 [29 USCA 187]: *Boycotts and other unlawful combinations; right to sue; jurisdictions; limitations; damages*

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

lawful acts of secondary boycott, violence and depredation during an organizational strike in the coal fields of the Hazard-Letcher County, Kentucky area in 1959.

The case was tried before a jury in the District Court resulting in a plaintiffs' verdict, based on answers to interrogatories, in which the jury fixed compensatory damages at $150,000 and punitive damages at $100,000.

Two cases arising out of the same strike in Kentucky have been before this Court. *Flame Coal Co.* v. *United Mine Workers of America*, 303 F.2d 39 (CA 6, 1962) *cert. denied* 371 U.S. 891; *Sunfire Coal Co., et al.* v. *United Mine Workers of America*, 313 F.2d 108 (CA 6, 1963) *cert. denied* 375 U.S. 924. In these cases the activities of UMW were revealed and need be repeated only briefly here.

The strike extended into the coal fields of Tennessee where similar acts of depredation were committed. These acts were detailed in our opinions in *Allen* v. *United Mine Workers of America*, 319 F.2d 594 (CA 6, 1963); *White Oak Coal Co.* v. *United Mine Workers of America*, 318 F.2d 591 (CA 6, 1963) *cert. denied* 375 U.S. 966; *Gilchrist* v. *United Mine Workers of America*, 290 F.2d 36 (CA 6, 1961) *cert. denied* 368 U.S. 875 and *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F.2d 716 (CA 6, 1960) *cert. denied* 364 U.S. 881.

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(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title; . . . .

* * *

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Many of the questions raised in the present appeal have been repeatedly urged before us and decided adversely to UMW in the cases cited in the preceding paragraphs. They need not be redetermined.

After the oral arguments in this appeal were made and while the case was being considered by the Court, the Supreme Court granted certiorari in *Morton* v. *Local 20, Teamsters, Chauffeurs & Helpers Union,* 200 F.Supp. 653, *aff'd* 320 F.2d 505 (CA 6, 1963) *cert. granted* 375 U.S. 939. Thinking that *Morton* might control some of the issues here, we postponed further consideration to await the decision of the Supreme Court. *Morton* has now been decided[2] and leave was granted to counsel to file supplemental briefs in this appeal.

UMW contends that *Morton* controls the issues here. It argues that we have misapplied the doctrine of pendent jurisdiction in this case and in the cases which we have previously decided. It contends that Congress preempted the entire field in the enactment of Section 303 and, therefore, the state courts no longer have jurisdiction of a common law tort action for damages against a labor union for conspiracy or malicious destruction of a business or property; that it is wholly immaterial whether primary or secondary activities are attended by instigated riots, shootings or other methods of mob force and violence; that the sole remedy of an injured victim is a federal action under Section 303 in which jurisdiction is limited and state remedies may not be applied; that since jurisdiction has been preempted there is no pendent jurisdiction.

We do not understand that *Morton* sanctions any such propositions. Mr. Justice Stewart, who wrote the unanimous opinion of the Court, was careful to point out many times that *Morton* was a case of peaceful picketing and did

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[2]*Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton,* 377 U.S. 252 (1964).

not involve violence. He stated that a different rule applied to union violence, as follows:

> And in cases involving union violence, state law has been permitted to prevail by reason of controlling considerations which are entirely absent in the present case. "[W]e have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers* v. *Russell*, 356 U.S. 634; *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656. . . . State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. . . . *Id* at 257

Morton affirmed the award of compensatory damages for a Section 303 violation but denied recovery for items of damage not covered by the Act, even though permitted by state law, because in the absence of force and violence the field was preempted by federal law. If *Morton* had been brought in the state court instead of the federal court, only federal law could have been applied. The Court indicated that since the state court would have been without authority to award damages under state law, the District Court under the doctrine of pendent jurisdiction had no greater power to do so.

Section 303 provides a remedy only for damages to business or property caused by unlawful secondary activities. It affords no remedy for injuries to persons. It does not apply to unlawful primary activities. If UMW's contention is correct that Congress has preempted the entire field and there is no state or pendent jurisdiction, then the hapless victim of personal injuries, or damages inflicted to his property by unlawful primary activities, is left without remedy in either state or federal courts. He could not sue for

damages for an assault and battery committed on his person or for malicious destruction of his property or business.

We are taught, however, in *Automobile Workers* v. *Russell,* 356 U.S. 634 (1957) and *United Workers* v. *Laburnum Corp.,* 347 U.S. 656 that Congress, in enacting Section 303, did not deprive the victim of tortious conduct of his common law rights for all damages suffered. In *Laburnum,* the Supreme Court said:

> To recover damages under that section (303) is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common law liabilities generally. On the other hand, it is not consistent to say that Congress, in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet, without express mention of it, Congress abolishes all common law rights to recover damages caused more directly and flagrantly through such conduct as is before us. *Id.* at 666.

UMW attempts to distinguish these cases on the ground that jurisdiction was based on diversity of citizenship and not on Section 303 and that Section 303 provided a remedy which was not available in *Russell* and *Laburnum.* This is a distinction without a difference for their principles are applicable. The contention is refuted by the above quoted language in *Laburnum* where state jurisdiction was recognized in Section 303 cases.

Section 303 does not immunize unlawful acts of force and violence or malicious destruction of property committed by anyone in the course of a strike whether characterized as primary or secondary. It is not a haven for such conduct.

Pendent jurisdiction became firmly embedded in federal law by the decision of the Supreme Court in *Hurn* v. *Oursler,* 289 U.S. 238 (1932) which has been cited and relied on many times by the federal courts. See also: *Hillsboro* v. *Cromwell,* 326 U.S. 620, 629 (1945); *Armstrong* v. *Nu-Enamel*

Corp., 305 U.S. 315, 325 (1938); *Rumbaugh* v. *Winifrede Railroad Co.*, 331 F.2d 539 (CA 4, 1964). Under *Hurn*, piecemeal adjudication of a claim by different courts was eliminated. When a substantial federal claim is asserted the federal court has jurisdiction to fully determine it including its local aspects. The federal and state claims are regarded merely as different grounds to support a single cause of action. *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F.2d 52 (CA 6, 1959) *cert. denied* 359 U.S. 1013. This permits an award of punitive damages where authorized by state law. *Automobile Workers* v. *Russell, supra,* at 646.

The fact that a voluntary unincorporated labor organization may not be amenable to process in its common name in Kentucky does not affect the pendent jurisdiction of the federal court, for Section 303 permits suits against such an organization. We are concerned here with substantive rights not mere state procedural problems.

The complaint alleges facts sufficient to state a substantial claim justiciable not only under federal law but by the common law of Kentucky. Paragraph 5 alleges a secondary boycott to induce Elkhorn's employees to engage in a concerted refusal, in the course of their employment, to handle or work on coal produced by other employers with the object of forcing plaintiffs to cease doing business with other employers and force them to recognize or bargain with UMW as the representative of the employees of such other employers although UMW had not been certified as such representative pursuant to the provisions of the National Labor Relations Act (29 U.S.C. § 159).

Paragraph 6 of the complaint alleged conduct on the part of UMW to induce the employees of other employers to engage in a concerted refusal to handle coal destined for plaintiffs' premises with the object of forcing and compelling other employers and persons to cease doing business with plaintiffs and compel plaintiffs to recognize UMW as

the representative of plaintiffs' employees although UMW had not been certified as such representative by the National Labor Relations Board pursuant to the provisions of the National Labor Relations Act.

Paragraphs 7 and 8 alleged acts of violence and depredation.[3]

These allegations set forth a substantial federal claim under Section 303. The District Court had jurisdiction to determine not only the merits of this claim but the state claim as well. *Hurn* v. *Oursler, supra.* We have applied this doctrine consistently in *Allen, White Oak Coal Co., Flame, Sunfire, Osborne Mining Co., Gilchrist* and *Meadow Creek, supra.*

The evidence, together with the inferences properly deducible therefrom, was sufficient to require submission of the factual issues to the jury.

The jury could find that the picketing was aimed not only at plaintiffs, but at about one hundred seventy-six coal

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[3]7. In pursuance of the unlawful activities set forth above, and with the intent and purpose to unlawfully and illegally interrupt, impede, terminate and destroy the business of plaintiffs, and the property of plaintiffs, the Union, through its duly constituted and authorized officers, agents, representatives and members, caused huge motorcades to be assembled and formed to roam the highways and roads, day and night, in and around the vicinity of the property and operations of the plaintiffs; caused large and violent mobs of men to assemble on and about the premises of plaintiffs, and in other areas in the general vicinity, to trespass upon the properties and premises of the plaintiffs, to threaten, abuse, intimidate and injure the employees of the plaintiffs, and other persons and their employees seeking and desiring to do business with plaintiffs, with the result that the plaintiffs' employees, persons seeking and desiring to do business with plaintiffs, and the employees of such persons, were alarmed and frightened and intimidated to such extent that the plaintiffs were unable to continue to operate their businesses, to do business with other persons, or to fulfill their business commitments and obligations.

8. In furtherance of the illegal and wrongful activities set forth in Paragraphs 5, 6 and 7 above, the Union also caused the expensive and elaborate facilities and equipment located at Kona, Kentucky, and held under lease by the partnership, to be destroyed by fire, and to cause eight railroad cars of coal owned by the partnership to be destroyed in the same fire that destroyed said facilities and equipment, with the result that these properties and assets were rendered useless for the purposes of plaintiffs' business, and became of no market value.

operators in the field. Everyone in the field was affected. UMW was attempting to "persuade" coal operators to sign the National Bituminous Coal Wage Agreement as amended. Plaintiffs refused to sign it for two reasons: operations under it would be unprofitable and the agreement prohibited them from purchasing any coal from anyone except signers of the agreement. Plaintiffs did not mine coal. They purchased most of the coal which they processed and sold from small non-union operators. Plaintiffs processed the coal at their tipples.

The picketing extended to plaintiffs' employees and also mine operators and their employees, who supplied plaintiffs with coal, and truck drivers and their employees, who delivered coal to plaintiffs' tipples. The picketing was at tipples and at other areas in the field. The method of persuasion was as follows:

Whole mobs of men congregated. They heard addresses from UMW officials and then started out in huge motorcades to stop the mining operations of all mine operators in the field. As many as four hundred to five hundred men picketed plaintiffs' Mayking tipple on one occasion and one thousand men at other places in the field. Vile and abusive language was used; rocks were thrown at trucks; truck drivers were threatened with bull whips and shot at; shots were fired at the Mayking tipple, and at houses occupied by plaintiffs' employees; the Kona tipple was set on fire and destroyed; state police and the National Guard were called; injunctions were obtained from courts.

The Court did not err in his instructions to the jury. He read Section 303 to the jury and properly instructed them as to the law of secondary boycotts. He told the jury repeatedly that the Union had the lawful right to strike and to picket and was liable for damages only for unlawful acts which it committed or authorized. He gave illustrations and examples of the type of conduct which were unlawful.

His instructions as to punitive damages conformed to Kentucky law as we have interpreted it in *Flame* and *Sunfire*.

The award of compensatory damages was within the range of the testimony. The jury resolved the factual issues in favor of plaintiffs. We see no occasion to interfere with the jury's verdict.

Affirmed.

Judgment

Filed October 3, 1964

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that plaintiffs-appellees recover from defendant-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Approved for entry:
/s/ Paul C. Weick
Chief Judge

APPENDIX B

Labor Management Relations Act, 1947, Section 303 [29 USCA 187]: ***Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages***

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials. or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees

performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under sub-chapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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Labor Management Relations Act, 1947, as Amended September 14, 1959, Section 8(b)(4)(i) [29 USCA 158(b)(4)(i)]:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

" . . .

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . ."

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28 USCA 1332 reads, in part, as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

". . . . . ."

Labor Management Relations Act, 1947:

"Sec. 158: . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ."